UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
CURTIS ROY FOX,	)	CASE NO. 03-60547 JPK
	)	Chapter 7
Debtor.	)	

MEMORANDUM OF DECISION CONCERNING
CONTESTED MATTER/TRUSTEE'S MOTION
TO COMPROMISE

The Chapter 7 case of Curtis Roy Fox ("Fox") was initiated by a voluntary petition filed on February 12, 2003. Stacia L. Yoon was appointed as the Chapter 7 Trustee to administer Fox's bankruptcy estate ("Trustee"). The Trustee filed her final report on September 14, 2004, and an order closing the case was entered on May 18, 2005. On March 8, 2007, the Trustee filed a motion to reopen the case, which was granted by an order entered on March 13, 2007. On March 15, 2007, the Trustee filed an application to employ Attorney Richard E. Vawter as special counsel for the Chapter 7 Trustee, which was granted by an order entered on March 15, 2007. The order of appointment provided that Attorney Vawter's compensation would be based upon a contingency fee arrangement. The focus of Attorney Vawter's appointment was litigation involving a parcel of real estate of approximately eight acres in which the bankruptcy estate had an interest, litigation in which the debtor Fox had originally been designated as the defendant, and in which Attorney Vawter filed a counterclaim on behalf of the Chapter 7 bankruptcy estate. The litigation – conducted in the Porter County Superior Court presided over by the Honorable William E. Alexa – proceeded apace until a proposed arrangement was arrived at among the parties to the litigation: the plaintiff Elsie Beiswanger and the Chapter 7 Trustee, who had assumed the position of defendant/counter-claimant with respect to Fox's interests in the case.

On October 12, 2009, the Trustee filed her Motion to Approve Compromise in

Settlement, to which Fox responded by his Objection to Trustee's Motion to Approve Compromise in Settlement filed on November 1, 2009. The contested matter to which this memorandum relates was thus joined.

The court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(a) and (b); 28 U.S.C. § 157(a); and N.D.Ind.L.R. 200.1. The contested matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

The issue before the court is whether the Trustee's Motion to Approve Compromise in Settlement should be approved under the standards provided by applicable law.[1]

Many of the facts pertinent to the issue will be addressed below in conjunction with discussion of the law applicable to determination of the contested matter. However, it is instructive to begin by elucidating the manner in which issues concerning the subject eight-acre parcel of real estate arose.

Prior to the filing of his bankruptcy case, Fox had purchased two separate parcels of real estate in Starke County, Indiana, one of which was a one-acre parcel, and the other of which was an eight-acre parcel (the areas of the parcels are stated descriptively to differentiate them; the eight-acre parcel has been perhaps more accurately described as 8.1 acres). At the trial of the contested matter held on July 21, 2010, Fox testified that he had purchased the one-acre parcel in the Spring of 1998, and that he purchased the eight-acre parcel six or eight months later in the Fall of 1998. Fox obtained a mortgage loan to build a house on the one-

[1] This is the sole issue before the court in this contested matter. During the course of hearings in the contested matter, Fox advanced a proposal with respect to resolution/liquidation of the bankruptcy estate's interest with respect to the eight-acre parcel which forms the core of this matter. The matter before the court does not involve a motion to sell property, either by a motion to approve a private sale or by an auction procedure established by order of the court, and thus there are no competing bids or offers to consider in this context. Moreover, at the time that the Trustee's motion was filed, Fox's proposal was not on the table: the motion to compromise offer was the only matter before the court. Thus, Fox's proposal is not a factor which the court will take into consideration in determining the contested matter.

acre parcel, with respect to which he testified he began construction in November of 1998 and finished the house and moved in in May of 1999. This house is entirely located upon the one-acre parcel. Fox made no improvements to the eight-acre parcel.

Fox defaulted on a mortgage with respect to the one-acre parcel, and a foreclosure was initiated and concluded with respect to that mortgage. The Sheriff's sale with respect to the foreclosure took place in July of 2002, and by that point Fox had vacated the house. Elsie Beiswanger ("Beiswanger") purchased the foreclosed property from the successful mortgagee bidder at the Sheriff's sale in August of 2003. Although mortgages encumbered only the one-acre parcel, all parties agree that Beiswanger, based upon her transactions with a broker or brokers involved in the sale, believed that she was purchasing a nine-acre parcel comprised of the one-acre tract upon which the foreclosure had been effected and the additional eight acres which are now involved in this contested matter. Acting upon that belief, between August and October of 2003, Beiswanger built a pole barn on the eight-acre tract, in a corner of the property which adjoined the one-acre tract.

Subsequently, Fox was advised by a friend that he had read something concerning a tax sale of property which appeared to be the eight-acre tract, which designated Fox as the owner of the property. Fox brought this matter to the attention of Attorney Richard Vawter, who was his bankruptcy counsel, who advised Fox to pay the amount necessary to redeem the property form the tax sale purchaser, which Fox did. The Trustee was notified of the potential interest of the bankruptcy estate in the eight-acre parcel, which resulted in the Trustee's reopening of the Chapter 7 bankruptcy case on March 13, 2007.

Prior to January 4, 2007, a dispute arose between Fox and Beiswanger over the ownership and improvements placed upon the eight-acre tract. Beiswanger filed a lawsuit in the Porter County Circuit Court, case number 64D02-0701-PL-694, which named Fox as the defendant. This complaint, filed on January 24, 2007, was entitled "Complaint for Equitable

Relief". Count I requested that the court determine that Beiswanger "has an equitable lien on the property owned by the defendant (Fox), that such lien be foreclosed for the value of the improvements on the defendant's property . . .". Count II asserted that Beiswanger was entitled to recover the value of the improvements she had made to the eight-acre tract under the Indiana Occupying Claimant Statute. In other words, the plaintiff Beiswanger sought to obtain an interest in the eight-acre tract by virtue of her construction of the pole barn on the tract, or alternatively, sought to obtain the value of the pole barn itself from the defendant. As stated, Attorney Vawter was approved by the court to act as special counsel for the Trustee with respect to matters relating to the lawsuit by order entered on March 15, 2007 – although no order appears to have been entered in the Porter County Superior Court case substituting the Chapter 7 Trustee for Fox (which would have been correctly done had it been done), all parties in the litigation proceeded as if the interests in the lawsuit in relation to Fox were those of the Chapter 7 bankruptcy estate. Attorney Vawter filed an answer and counterclaim on behalf of Fox on April 30, 2007: the answer was a general denial of the averments of the two counts of the complaint; the counterclaim asserted that either Beiswanger should be ordered to reimburse Fox (the Chapter 7 bankruptcy estate) for the loss of value to the real estate resulting from the construction of the pole barn, or in the alternative that she should be required to remove the pole barn and restore the property to its condition prior to that building's construction.

So, we have a circumstance in which there were originally two separate parcels of real estate: a one-acre tract upon which a house was constructed, and an eight-acre unimproved tract – both owned by Fox. Fox's default on a mortgage resulted in a foreclosure with respect to the one-acre parcel, and purchase of that parcel at the Sheriff's sale by a mortgagee. That parcel was sold to Beiswanger, through the use of a realtor. Beiswanger was not represented by counsel with respect to the sale, and Beiswanger reasonably assumed (all parties agree on

this) that she was purchasing the nine acres at the closing of this transaction.[2] As a result of her understanding of the transaction, Beiswanger built a pole barn on real estate which could not have been foreclosed on and was not in fact subject to the foreclosure sale. Fox did nothing with respect to the eight acres after the foreclosure, until a friend notified him that apparently the property was listed in his name as being subject to tax sale proceedings, at which point he notified Attorney Vawter and redeemed the eight-acre tract from the tax sale purchaser. This again placed Fox in title as the owner of the eight-acre parcel, upon which now was situated a pole barn constructed by Beiswanger. Exhibit 23, submitted at the trial, establishes that at least $1133.80 is owed for delinquent taxes and related charges with respect to the eight-acre tract.

As a predicate for discussion of the legal principles applicable to this case, the court will first address its determination as to certain facts relating to the two parcels of real estate. The eight-acre tract includes a 29-30 foot frontage on a public road. This strip was developed by the construction of a driveway/road which allows access off of it to the one-acre tract upon which the house is built. While the one-acre tract has a 125 foot frontage on the county road, the legal title to that property does not include an ownership interest in the 29-30 foot strip which leads back to the eight-acre tract, which is the only presently improved access to the one-acre tract. It is clear that when Fox built the house on the one-acre tract, he was relying on use of the 29-30 foot strip for access from the one-acre tract to the county road; without discussing the nuances of the multiple types of easements recognized by Indiana law, the court determines that it is a very probable result that any Indiana state court would determine that the one-acre parcel is entitled to an easement for use of the 29-30 foot strip for access to the public

[2] The court does note, however, that the deed of property to Beiswanger as a result of her purchase is clear that only the one-acre tract was the subject of the transaction.

way[3]. The pole barn is in an extreme corner of the eight-acre parcel adjoining the one-acre tract. The eight-acre tract is presently zoned agricultural. No proceedings have ever been undertaking to re-zone the eight acres, to seek to establish a planned unit development on the eight acres, or to seek a variance of any kind for subdivision of the eight acres into lots and development of a small subdivision. As unimproved farmland, the per acre fair market value of the property was reasonably considered by the Trustee and Attorney Vawter to be $2,000.00 per acre, as stated in the appraisal relied upon by the Trustee.[4]

The court thus determines that any valuation of the subject eight acres as other than vacant agricultural land would be entirely speculative. Based upon the record, the court determines that a reasonable valuation of the property as vacant agricultural land is $2,000.00 per acre, thus making the entire value of the eight-acre tract a gross value of $16,000.00. The eight-acre tract has a 29-30 foot access onto a county road. However, that access is subject to the right of use by the present owner of the one-acre tract, in this case Beiswanger.

We now turn to the legal issues involved in this case, and the application of facts established by record to those issues.

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[3] Attorney Vawter's trial testimony stated that he took this easement issue into account.

[4] The appraisal relied upon by the Trustee determined the value to be $2,000.00 per acre. The appraisal states: "Per county codes this property is not buildable due to the lack of not having 100' frontage on Co. Highway." At the trial held on July 21, 2010, Fox, through his attorney, introduced the testimony of Gene Eldridge, whom the court accepted as an expert with respect to real estate valuation matters. Mr. Eldridge, who is a realtor/broker, testified that were he to list the eight acres for sale, he would list it for what he deemed to be its "highest and best use", i.e., the development of a multi-lot subdivision. However, Mr. Eldridge's testimony established that he has no present knowledge of the zoning of the property, and that Starke County's requirements may have changed since his last involvement with the property with respect to development of subdivisions in areas such as that in which the property is located. In other words, Mr. Eldridge's testimony established that any value of the property based upon other than agricultural use is entirely speculative. Mr. Eldridge's testimony is also somewhat vacillatory as to the value of an acre of land as agricultural land with respect to the property, and although he stated that it might be worth $2,500.00 per acre, he also stated that the more probable value was $2,000.00.

As the court advised the parties, the law to be applied to determination of issues in this contested matter is that stated by the court in its Memorandum of Decision Concerning Objection to Trustee's/Plaintiff's Proposed Compromise of Adversary Proceeding, record entry #79 in Adversary Proceeding 07-1287 in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division (*David Boyer, Plaintiff v. The Trustee of Indiana University and Indiana Higher Education Telecommunications System*). That law was stated as follows:

> The standards for reviewing whether or not a contested compromise by a trustee will be approved have been expansively addressed by the United States Supreme Court, by the United States Court of Appeals for the Seventh Circuit, and by United States Bankruptcy Courts in the Seventh Circuit.
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> The general parameters of review, and of the court's involvement in the review process, were stated by the Supreme Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 88 S.Ct. 1157, 1163 (1968), as follows: FN2
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> > Compromises are 'a normal part of the process of reorganization.' Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130, 60 S.Ct. 1, 14, 84 L.Ed. 110 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time, however, it is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court. National Surety Co. v. Coriell, 289 U.S. 426, 436, 53 S.Ct. 678, 682, 77 L.Ed. 1300 (1933). The requirements of ss 174 and 221(2) of Chapter X, 52 Stat. 891, 897, 11 U.S.C. ss 574, 621(2), that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations. Ashbach v. Kirtley, 289 F.2d 159 (C.A. 8th Cir. 1961); Conway v. Silesian-American Corp., 186 F.2d 201 (C.A.2d Cir. 1950). The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable. In re Chicago Rapid Transit Co., 196 F.2d

> 484 (C.A. 7th Cir. 1952). There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.
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> FN2 Although the case dealt with court review of confirmation of a Chapter 11 plan, the essential elements of review of a compromise were present in those circumstances.

The basic standards for review of compromise of an adversary proceeding were stated in *In re Doctors Hospital of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007), as follows:

> Bankruptcy courts may approve adversary litigation settlements that are in the best interests of the estate. *In re Energy Co-op., Inc.,* 886 F.2d 921, 927-29 (7th Cir.1989); *In re Am. Reserve Corp.,* 841 F.2d 159, 161 (7th Cir.1987). The linchpin of the "best interests of the estate" test is a comparison of the value of the settlement with the probable costs and benefits of litigating. *In re Energy Coop.,* 886 F.2d at 927. Among the factors the court considers are the litigation's probability of success, complexity, expense, inconvenience, and delay, "including the possibility that disapproving the settlement will cause wasting of assets. " *In re Am. Reserve,* 841 F.2d at 161. As part of this test, the value of the settlement must be reasonably equivalent to the value of the claims surrendered. This reasonable equivalence standard is met if the settlement falls within the reasonable range of possible litigation outcomes. *In re Energy Co-op.,* 886 F.2d at 929; *In re N.Y., New Haven & Hartford R.Co.,* 632 F.2d 955, 960 (2d Cir.1980); *see also Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-25, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968); *Depoister v. Mary M. Holloway Found.,* 36 F.3d 582, 586 (7th Cir.1994). Because litigation outcomes cannot be predicted with mathematical precision, only if a settlement falls below the low end of

> possible litigation outcomes will it fail the reasonable equivalence standard. *In re Energy Co-op.,* 886 F.2d at 929.
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> The bankruptcy court's approval of the settlement is reviewed deferentially, for abuse of discretion. *Depoister,* 36 F.3d at 586. The bankruptcy court must independently evaluate the settlement, not simply accept the recommendation of the trustee. *TMT Trailer Ferry,* 390 U.S. at 424, 88 S.Ct. 1157; *Depoister,* 36 F.3d at 586-87; *In re Am. Reserve,* 841 F.2d at 162. If the decision demonstrates a command of the case, we will not engage in second-guessing; the bankruptcy court is in a better position "to consider the equities and reasonableness of a particular compromise." *In re Am. Reserve,* 841 F.2d at 162. Factual findings are reviewed for clear error; legal conclusions are reviewed de novo. Fed. R. Bankr. P. 8013; *In re Crosswhite,* 148 F.3d 879, 881 (7th Cir.1998).

The foregoing was essentially a distillation of the standards stated in *LaSalle National Bank v. Holland*, 841 F.2d 159, 161-162 (7th Cir. 1987):

> A bankruptcy judge may approve a settlement in a liquidation proceeding if the settlement is in the estate's best interests. *n re A & C Properties,* 784 F.2d 1377, 1380, 1382 (9th Cir.), *cert. denied, Martin v. Robinson,* 479 U.S. 854, 107 S.Ct. 189, 93 L.Ed.2d 122 (1986); *In re Blair,* 538 F.2d 849, 852 (9th Cir.1976); *In re Patel,* 43 B.R. 500, 505 (N.D.Ill.1984); *In re Central Ice Cream Co.,* 59 B.R. 476, 487 (Bankr.N.D.Ill.1985). Central to the bankruptcy judge's determination is a comparison of the settlement's terms with the litigation's probable costs and probable benefits. Among the factors the bankruptcy judge should consider in his analysis are the litigation's probability of success, the litigation's complexity, and the litigation's attendant expense, inconvenience, and delay (including the possibility that disapproving the settlement will cause wasting of assets). *See In re A & C Properties,* 784 F.2d at 1381; *In re Blair,* 538 F.2d at 851; *cf. McDonald v. Chicago Milwaukee Corp.,* 565 F.2d 416, 427 (7th Cir.1977) (noting similar factors to consider in approving a settlement in a class action). The bankruptcy judge should also consider the creditors' objections to the settlement; however, the creditors' views are not controlling. *In re A & C Properties,* 784 F.2d at 1382.
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> The appellants insist that a bankruptcy judge may approve a settlement only if it is "fair and equitable." "Fair and

> equitable" is a term of art that means that " 'senior interests are entitled to full priority over junior ones.' " *In re AWECO, Inc.,* 725 F.2d 293, 298 (5th Cir.) (citation omitted), *cert. denied,* 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed.2d 182 (1984). In a settlement context, "fair and equitable" means that the settlement reasonably accords with the competing interests' relative priorities.
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> Any distinction between the "best interests of the estate" and the "fair and equitable" standards is of little consequence. The cases appellants cite for the "fair and equitable" standard considered the factors we have noted above. *See, e.g., Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968); *In re A & C Properties,* 784 F.2d at 1381. Moreover, in comparing the settlement's terms with the litigation's probable costs and probable benefits, the central inquiry in determining whether a proposed settlement is in an estate's best interests, the bankruptcy judge must necessarily examine the relative priorities of the contested claim and the estate's other claims. Claims with different priorities will have different settlement values. For example, administrative expenses have priority over general, unsecured claims; therefore, all else being equal, an administrative expense claim will have a higher settlement value than a general unsecured claim. Properly viewed then, the "fair and equitable" analysis-that is, comparing claims' relative priorities-is just one factor for the bankruptcy judge to consider in determining whether a settlement is in the estate's best interest.

The role of the bankruptcy court in determining whether or not a compromise which has been objected to should be approved is a difficult one. Obviously, the case/controversy to which the compromise relates cannot be fully tried before the court to determine the efficacy of the compromise. However, the standards imposed upon bankruptcy courts for review of compromises result in essentially "mini-trials" of the case itself, many times involving submission of evidence far beyond that necessarily considered by the trustee in legitimately reviewing the case for compromise, or by the objectant in initiating a contested matter to oppose the compromise. The standard for court review was generally stated in *LaSalle National Bank v. Holland*, 841 F.2d 159, 162 (7th Cir. 1987) as follows:

> (The bankruptcy judge) may not simply accept the trustee's word that the settlement is reasonable, nor may he merely "rubberstamp" the trustee's proposal. The

> bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an "informed and independent judgment" about the settlement. *See TMT Trailer Ferry,* 390 U.S. at 424, 434, 88 S.Ct. at 1163, 1168; *In re A & C Properties,* 784 F.2d at 1383.
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> In exercising his discretion, the bankruptcy judge must also give the reviewing court "some basis for distinguishing between well-reasoned conclusions arrived at after comprehensive consideration of all relevant factors, and mere boilerplate approval ... unsupported by evaluation of the facts or analysis of the law." *TMT Trailer Ferry,* 390 U.S. at 434, 88 S.Ct. at 1168. In other words, the bankruptcy judge must make findings and explain his reasoning sufficiently to show that he examined the proper factors and made an informed and independent judgment.

See also, In re Energy Cooperative, Inc., 886 F.2d 921, 928-29 (7th Cir. 1989). As stated in *Depoister v. Mary M. Holloway Foundation*, 36 F3d. 582, 585-586 (7th Cir. 1994):

> Under Bankruptcy Rule 9019(a), the bankruptcy court may approve a compromise or settlement "[o]n motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustee...." In conducting a hearing under Rule 9019(a), the bankruptcy court is to determine whether the proposed compromise is fair and equitable, *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968), and in the best interests of the bankruptcy estate, *In re American Reserve Corp.,* 841 F.2d 159, 161 (7th Cir.1987). In making this determination, a bankruptcy judge is required to apprise himself "of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *TMT Trailer Ferry, Inc.,* 390 U.S. at 424, 88 S.Ct. at 1163; *see also American Reserve Corp.,* 841 F.2d at 161. To this end, the bankruptcy judge should:
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> form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of the litigation.

TMT Trailer Ferry, Inc., 390 U.S. at 424-25, 88 S.Ct. at 1163.

Because the calculus of settlements is not based upon definitive determination of asserted claims or defenses, the review of a compromise involves analysis of possible ranges of best case/worst case results, and the realization that the compromise will be valid if it falls within a range defined at its bottom line as the lowest possible reasonably estimated settlement result. As stated in *In re Energy Cooperative, Inc.*, 886 F.2d 921, 928-929 (7th Cir. 1989), the methodology is the following:

> This is the methodology that the appellants would have the district court follow when approving a settlement agreement. The world of settlements, however, does not read like a balance sheet-nor should it. Assigning value to contested claims cannot be done with the same precision as assigning value to a bill for the receipt of goods. Who is to say whether the Trustee has a 10% or a 20% chance of recovering on the alter ego claim? Under the appellants' methodology, that 10% difference is worth $30 million. Furthermore, assuming theoretically that the alter ego claim is in fact worth $30 million, inducing the Member-Owners to actually pay $30 million for it in practice is quite another matter. The appellants' myopic valuation method also fails to take into account that the burdens of litigation do not fall evenly in this kind of a situation. Delay inures to the benefit of the Member-Owners and Banks because the Trustee seeks to collect from them. Furthermore, the Banks and Member-Owners are in a better position to bear the burden of litigation costs. The Trustee's resources are more limited and strategic decisions are influenced by the fact that for each dollar spent on litigation, there is one less dollar available for distribution to general creditors. Courts thus do not require the use of a rigid mathematical formula to set dollar values on disputed claims because to do so "would create an illusion of certainty where none exists and place an impracticable burden on the whole ... [settlement] process." *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 318 U.S. 523, 565-66, 63 S.Ct. 727, 749-50, 87 L.Ed. 959 (1943). *See also In re Penn Central Transp. Co.,* 596 F.2d 1102, 1114 (3rd Cir.1979) ("[T]he weighing of a claim against compensation cannot be an exact [determination]. Nor should it be, since an exact judicial determination of the values in issue would defeat the purpose of compromising the claim.").
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> Rather, the job of the reviewing court is to determine whether "the value of the proposed compromise

> distribution is *reasonably* equivalent to the value of the potential claim which has been surrendered or modified by the settlement which has been achieved." *In re New York, N.H. & H.R. Co.,* 632 F.2d at 955 (emphasis added). The test for reasonable equivalence is "whether or not the terms of the proposed compromise fall within the reasonable range of litigation possibilities." *Id.* (*citing TMT,* 390 U.S. at 424-25, 88 S.Ct. at 1163-64; *In re Penn Central,* 596 F.2d at 1114; *Florida Trailer & Equipment Co. v. Deal,* 284 F.2d 567, 571 (5th Cir.1960); *In re California Associated Products Co.,* 183 F.2d 946, 949-50 (9th Cir.1950); *In re Equity Funding Corp.,* 416 F.Supp. 132, 145 (C.D.Cal.1975)). A challenged settlement fails this test only if it "fall[s] below the lowest point in the range of reasonableness." *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2nd Cir.), *cert. denied,* 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983) (*quoting Newman v. Stein,* 464 F.2d 689, 693 (2nd Cir.), *cert. denied sub nom. Benson v. Newman,* 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972)).

Considerations of uncertain results under applicable law – without actually deciding the controlling legal issues – also figure into the calculus; *see, In re Andreuccetti*, 975 F.2d 413, 420-421 (7th Cir. 1992).

Although the trustee's determination of a compromise is not controlling, the trustee is invested with a great deal of discretion as to the exercise of his/her business judgment, as stated in *In re Consolidated Industries Corp.,*, 330 B.R. 712, 715 (Bankr. N.D.Ind. 2005) as follows:

> Determining whether there are genuine issues of material fact concerning the trustee's duty as to the prosecution of the claims in question must begin with an understanding of the nature of that duty. Only after we understand the nature and scope of the trustee's duty to administer the assets of the estate can we determine whether there has been any dereliction of that duty. A bankruptcy trustee is not required to prosecute every cause of action belonging to the bankruptcy estate. *Koch Refining v. Farmers Union Cent. Exchange, Inc.,* 831 F.2d 1339, 1346-47 (7th Cir.1987); *In re Reed,* 178 B.R. 817, 821 (Bankr.D.Ariz.1995). Instead, the trustee is given a substantial degree of discretion in deciding how best to administer the estate committed to his care and his actions are measured by a business judgment standard. *In re Fulton,* 162 B.R. 539, 540 (Bankr.W.D.Mo.1993); *In re Cult Awareness Network, Inc.,* 205 B.R. 575

> (Bankr.N.D.Ill.1997); *In re Curlew Valley Associates,* 14 B.R. 506, 513 (Bankr.D.Utah 1981); *Ford Motor Credit Co. v. Weaver,* 680 F.2d 451 (6th Cir.1982). So long as the trustee's decision concerning how or whether to administer an asset or to pursue a cause of action falls within the proper scope of the trustee's business judgment, the trustee's decision will be upheld. *In re Cult Awareness,* 205 B.R. 575; *In re Fulton,* 162 B.R. at 540; *In re Wilson,* 94 B.R. 886, 888 (Bankr.E.D.Va.1989).

This explains the reason that a compromise within the lowest reasonably anticipated settlement range will be approved.

Excellent overviews of all of the foregoing requirements have been provided by two bankruptcy courts sitting in the Seventh Circuit. First, in *In re Rimsat, Ltd.*, 224 B.R. 685, 688 (Bankr.N.D.Ind. 1997), the following was stated:

> Whether or not a proposed settlement is approved is a matter committed to the bankruptcy court's discretion. *Matter of Andreuccetti,* 975 F.2d 413, 421 (7th Cir.1992); *In re American Reserve Corp.,* 841 F.2d 159, 162 (7th Cir.1987). As observed by the Seventh Circuit, this requires the court to actually exercise its discretion. We are not permitted to just accept the representation that the settlement is fair and reasonable. Instead, the court must familiarize itself with all of the attendant facts and circumstances, in order to "make an 'informed and independent judgment' about the settlement." *American Reserve Corp.,* 841 F.2d at 162 (citation omitted). Among the factors which the court considers in its evaluation are the nature and complexity of the dispute and its probable outcome, together with the expense, inconvenience and delays necessarily attendant to litigation. Objections to the settlement must also be considered, although the views of objecting creditors are not controlling. *Id.* at 161-62.
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> While the court must make an informed and independent judgment concerning the propriety of the proposed settlement, it need not make an independent investigation of the facts and it may give weight to the trustee's informed judgment and consider the competency and experience of counsel who support the compromise. *Depoister v. Mary M. Holloway Foundation,* 36 F.3d 582, 587 (7th Cir.1994); *In re International Distribution Centers, Inc.,* 103 B.R. 420, 422-23 (S.D.N.Y.1989); *In re Drexel Burnham Lambert Group., Inc.,* 134 B.R. 493, 496 (Bankr.S.D.N.Y.1991); *In re Del Grosso,* 106 B.R. 165, 168 (Bankr.N.D.Ill.1989). The court also need not conduct

> a mini-trial on the merits of the case. *International Distribution,* 103 B.R. at 423; *Drexel Burnham,* 134 B.R. at 496-97. *See also, Depoister,* 36 F.3d at 586 (evidentiary hearing not required).
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> [T]he bankruptcy court's responsibility is not to decide the numerous questions of law and fact raised by parties, but rather to canvas the issues in order to determine whether the settlement "falls below the lowest point in the range of reasonableness." *In re Goldstein,* 131 B.R. 367, 370 (Bankr.S.D.Ohio 1991) (citations omitted). *See also, In re Lawrence & Erausquin, Inc.,* 124 B.R. 37, 38 (Bankr.N.D.Ohio 1990) (what is being sought is not resolution of issues but their identification and clarification).
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> "The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate." *Matter of Energy Co-op., Inc.,* 886 F.2d 921, 927 (7th Cir.1989). As the proponent of the settlement, the trustee has the burden of proving that it is. *In re Bell & Beckwith,* 93 B.R. 569, 574 (Bankr.N.D.Ohio 1988). The central inquiry in the determination involves "a comparison of the settlement's terms with the litigation's probable costs and probable benefits." *American Reserve Corp.,* 841 F.2d at 161. The court must examine the terms of the proposed settlement, in light of the risks and rewards of not settling, and determine whether the proverbial bird in the hand is worth two in the bush. While this is not and cannot be the subject of a rigid, mathematical analysis, there must, nonetheless, be some type of correspondence between what is being given in connection with the compromise and what might be received if the dispute was prosecuted to its ultimate conclusion. Thus, the consideration being given in connection with the settlement must be "reasonably equivalent" to the value of the disputed claim, by "fall[ing] within the reasonable range of litigation possibilities." *Energy Co-op.,* 886 F.2d at 929 (quoting *Matter of New York, N.H. & H.R. Co.,* 632 F.2d 955 (2d Cir. 1980)); *Matter of Krizmanich,* 139 B.R. 456, 460 (Bankr.N.D.Ind.1992).

In *In re Del Grosso*, 106 B.R. 165, 167-168 (Bankr. N.D.Ill. 1989), the following was stated:

> Bankruptcy Rule 9019(a) empowers the Court to approve a proposed compromise or settlement and provides in relevant part that: "[o]n motion by the trustee and after a

hearing on notice to creditors ... and to such other persons as the Court may designate, the court may approve a compromise or settlement." Fed.R.Bankr.P. 9019(a). Rule 9019(a) is essential the same as former Rule 919(a). The Rule has been construed to give the Court broad authority to approve compromises. *In re Sherman Homes, Inc.,* 28 B.R. 176, 177 (Bankr.D.Me.1983). Courts generally recognize that compromises are favored. *See In re New York, New Haven & Hartford Railroad Co.,* 632 F.2d 955 (2d Cir.1980), *cert. denied,* 449 U.S. 1062, 101 S.Ct. 786, 66 L.Ed.2d 605 (1980). The purpose of a compromise is to allow the Trustee and the creditors to avoid the expenses and burdens associated with litigating contested claims. *Matter of Walsh Construction, Inc.,* 669 F.2d 1325, 1328 (9th Cir.1982).

In spite of the requirement of Court approval, the Trustee must initially determine whether litigation should be settled and whether the terms are in the best interest of the estate. The Trustee's power to compromise extends to all controversies affecting the estate and not merely those involved in pending suits. *Florida Trailer and Equipment Company v. Deal,* 284 F.2d 567, 569 (5th Cir.1960). The requirement that adequate information be set forth in sufficient detail to enable approval of a settlement parallels the same requirement applicable to consideration of settlements in class actions or derivative actions pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure. *In re Lion Capital Group,*49 B.R. 163, 176 (Bankr.S.D.N.Y.1985).

The decision to approve an application to compromise is a matter within the discretion of the Court. *In re Aweco, Inc.,* 725 F.2d 293, 297 (5th Cir.1984) *cert. denied,* 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed.2d 182 (1984); *In re Sherman Homes, Inc.,* 28 B.R. at 177. The decision will not be disturbed on appeal absent a clear showing of abuse of discretion. *In re Patel,* 43 B.R. 500, 504-505 (N.D.Ill.1984); *In re Bell & Beckwith,* 77 B.R. 606, 611 (Bankr.N.D.Ohio 1987) *aff'd,* 87 B.R. 472 (N.D. Ohio 1988). Generally, the Court will approve a settlement if it is in the best interest of the estate. *In re American Reserve Corp.,* 841 F.2d 159, 161 (7th Cir.1987); *In re A & C Properties,* 784 F.2d 1377, 1380-1382 (9th Cir.1986), *cert. denied, Martin v. Robinson,* 479 U.S. 854, 107 S.Ct. 189, 93 L.Ed.2d 122 (1986); *In re Heissinger Resources Ltd.* 67 B.R. 378, 383 (C.D.Ill.1986); *Patel,* 43 B.R. at 505; *In re Central Ice Cream Co.,* 59 B.R. 476, 487 (Bankr.N.D.Ill.1985) ("In approving a settlement in a liquidation proceeding, the Court must determine what

course of action is in the best interest of the Estate, with major consideration to the interests of creditors.... A proposed settlement in a liquidation proceeding should be approved if it provides for 'the best possible realization upon the available assets ... without undue waste or needless or fruitless litigation.' " *Id.* at 487 (*quoting In re Kearney,* 184 F. 190, 192 (N.D.N.Y.1910)).

Prior to approving a settlement, the Court has the duty to review the merits of the agreement to ensure that the compromise is fair. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968). (" *TMT Trailer* ").FN1 In exercising its discretion, the bankruptcy court must weigh all factors bearing on the reasonableness of the settlement including: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense and inconvenience in delay necessarily attending it; and 4) the paramount interest of the creditors and a proper deference to their reasonable views. *In re Flight Transportation Corp. Securities Litigation,* 730 F.2d 1128, 1135 (8th Cir.1984) *cert. denied,* 469 U.S. 1207, 105 S.Ct. 1169, 84 L.Ed.2d 320 (1985), *citing Drexel v. Loomis,* 35 F.2d 800, 806 (8th Cir.1929). *Accord, TMT Trailer,* 390 U.S. at 424-425, 88 S.Ct. at 1163-1164; *Patel,* 43 B.R. at 504; *Central Ice Cream Co.,* 59 B.R. at 487; *In re Erickson,* 82 B.R. 97, 99 (D.Minn.1987). The Court has the responsibility of making an informed, independent judgment, apprising itself of "all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *TMT Trailer,* 390 U.S. at 424, 88 S.Ct. at 1163.

> FN1. Courts have used a "fair and equitable" standard and a "best interest of the estate" standard. The Seventh Circuit stated in *In re American Reserve Corp.,* 841 F.2d 159, 162 (7th Cir.1987), "[a]ny distinction between the 'best interests of the estate' and the 'fair and equitable' standards is of little consequence."

The Trustee, as proponent of the proposed settlement, has the burden of showing that the settlement terms are in the best interest of the estate. *In re Hallet,* 33 B.R. 564, 565-566 (Bankr.D.Me.1983). The Court may give weight to the opinions of the Trustee, the parties and their attorneys. *In re Blair,* 538 F.2d 849, 851 (9th Cir.1976). The Trustee's

> disapproval is a factor pointing to the impropriety of a compromise. *In re Paley,* 26 F.Supp. 952 (S.D.N.Y.1939). Proponents of settlement, and normally the Trustee in the first instance, must show the proposal is reasonable and that: 1) the settlement was not collusive, but was arrived at after arms-length negotiations; 2) that the proponents have counsel experienced in similar cases; 3) that there has been sufficient discovery of the underlying claims of parties to enable counsel to act intelligently; and 4) that the number of objectants or their relative interest is small. *Feder v. Harrington,* 58 F.R.D. 171, 174-175 (S.D.N.Y.1972).
>
> Once there is a showing that the settlement should be approved, the burden then shifts to the objecting party who cannot oppose the settlement by merely demanding more proof. "To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process.... [T]he objectors [must] have made a clear and specific showing that the vital material was ignored by the District Court." *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 464 (2d Cir.1974). The Court may approve a settlement over objections of some parties, as long as the settlement is in the best interests of the estate as a whole. *In re Flight Transportation Corp. Securities Litigation,* 730 F.2d 1128, 1138 (8th Cir.1984) *cert. denied,* 469 U.S. 1207, 105 S.Ct. 1169, 84 L.Ed.2d 320 (1985).

pages 2-13.

Pursuant to the court's order at the conclusion of the trial of the contested matter, the parties submitted legal memoranda in the form of final arguments. Fox's contentions are essentially two-fold. He contends first that the Trustee and her special counsel Attorney Vawter did not conduct an adequate investigation of the circumstances surrounding the property, including not consulting with Fox personally, and by relying on an appraisal that Fox construes to be based upon a factual inaccuracy, i.e., that the eight-acre tract had no access to a public road. Secondly, Fox challenges the Trustee's analysis of the settlement as being in the best interests of the bankruptcy estate.

Although not addressed by the parties, the standing of Fox to challenge the compromise

can be questioned. In order to have standing, a party must ordinarily have some stake or interest in the outcome of the matter at hand intended by applicable law to be subject to protection, or at least a right to be heard, with respect to the matter; *See*, *Tucker v. United States Department of Commerce*, 958 F.2d 1411 (7th Cir. 1992); *FutureSource LLC v. Reuters Limited*, 312 F.3d 281 (7th Cir. 2002). Federal Rule of Bankruptcy Procedure 9019(a) implicates the debtor's possible standing with respect to compromises by requiring that the debtor be provided with notice of a proposed compromise or settlement. However, in Fox's case, Mr. Fox is not a creditor, and he has no exempt interest in the eight-acre tract. Eight unsecured claims, totaling $73,017.46, have been filed in Fox's case, and there is thus no possibility that the estate's assets will exceed allowable claims, and thus no possibility that Fox might obtain a surplus distribution pursuant to 11 U.S.C. § 726(a)(6). Fox in his objection, which is focused on the Trustee's consideration of his alternative offer to pay the estate and to then himself retain the eight-acre tract, is essentially asserting a right – or entitlement to consideration – of redemption of property from the bankruptcy estate. The concept of redemption is limited by Fed.R.Bankr.P. 6008 to redeeming "property from a lien or from a sale to enforce a lien", a circumstance not applicable in this matter. Fox is on very thin ice as to his standing to assert an objection to the Trustee's proposed compromise, but because the issue of Fox's standing was not pressed, the court will allow Fox to skate over the thin ice of this issue.

The court will first review the contention as to the adequacy of the Trustee's investigation. The record establishes that the Trustee relied on a qualified appraiser's report to determine the value of the eight-acre parcel as an asset of the bankruptcy estate. Neither Trustee Yoon nor Attorney Vawter was personally familiar with any appraisers in Starke County in relation to the subject real estate, but the appraiser obtained was the subject of investigation by Attorney Vawter. The appraiser determined the value of the eight-acre parcel to be $16,000.00 ($2,000.00 per acre) as vacate agricultural land. The appraisal, performed by Steve

Whited of Whited Appraisal, Inc. as of May 22, 2009, determined that the value of the eight-acre tract was $16,000.00. The appraisal was submitted into evidence, and the "Comments on Sales Comparison" states the following:

> The subject site consists of 8 acre m/l with limited road frontage. The subject site per County Codes does not have adequate frontage to be buildable site. Comps 1 & 2 are competing site with adequate road frontage and treated as buildable sites. Comp #3 is larger tract that has adequate road frontage but no reasonable building site and is felt to provide tillable acres value. Comps 1 & 2 are given a 40% downward adjustment for superior site with building site. Comps 1 & 2 are adjusted to $2100 and $2000 per acre with comp #3 supporting $1933 per acre for tillable land. Due to the subject site not having adequate road frontage for buildable site the indicated value range of $2000 per acre is supported with direct sale from the subject market place. The scope of this assignment is to provide fair market value of the subject site per County Codes. In the scope of this appraisal an estimate for a smaller parcel of the subject site was requested. In all real estate market the smaller the parcel of land the higher the value. The subject 8 acre site is estimated at $2000.00 per acre with smaller site as one acre of less supporting 2 to 3 times the estimated value per acre. This appraiser search the Local Realtors and MLS data and could not find supporting data for special land use that is competing with the subject site.

During the trial of the contested matter, Attorney Naggatz sought to make a critical issue of access of the eight-acre tract to a public road, by construing the Trustee's appraiser's report to state that the tract had no access. That is not what the appraiser stated, as the above-quoted portion of the appraisal states. The appraisal was based on the eight-acre tract's having "limited road frontage", because pursuant to Starke County building codes, the parcel did not have adequate frontage to a public road to allow for buildable sites on the tract. The testimony by Mr. Eldridge submitted by Fox at the trial does not in any manner controvert this conclusion, and in fact establishes that Mr. Eldridge has no knowledge of present zoning requirements or building requirements with respect to subdivision of the eight-acre tract. In the trial presentation, Fox did not contest in any manner the appraiser's qualifications, the "comparable sales" utilized in the appraisal, or the ultimate conclusion of value based upon those

comparable sales. Rather, Fox's challenge to the appraisal was based upon an erroneous assumption – that the appraiser deemed the property to be totally "land locked", which is clearly not the case. If the Trustee's reliance on a qualified appraiser's appraisal was ever an issue with respect to adequate investigation in relation to the proposed compromise, the record establishes that the appraisal is dead on, and in fact concurs with Mr. Eldridge's testimony that the most probable value of the eight-acre tract is $2,000.00 per acre as unimproved farmland.

Having performed a reasonable and adequate inquiry as to an appraiser, unless the appraisal is obviously fraught with inconsistencies or invalid valuation methods, the Trustee could rely on the appraisal in making her decision to compromise. Nothing in the record as developed by Fox impugns the appraisal, and the court, having independently reviewed the appraisal (which was submitted into evidence) concludes that it is a standard reasonable appraisal based upon accurate information and stating valid conclusions based upon its underlying assumptions. Thus, the Trustee was entitled to rely on the appraisal in determining whether or not she should compromise the case in the manner which she proposed.

Fox also questions the fact that the Trustee did not consult with Curtis Fox himself as to the nature of the real estate or the circumstances involved with the eight-acre tract in relation to the one-acre tract. Let's start first with the principle that there is nothing in any applicable law which requires a trustee to consult with a debtor as to disposition of a bankruptcy estate's interests in property of the bankruptcy estate derived from interests of the debtor. Then let's go further. Mr. Fox, having essentially given the eight-acre tract up for dead by his non-payment of taxes on it and his surprise discovery that he still had some interest in it, would have known what material facts about the property of which the Trustee was not apprised? Fox's testimony establishes that he has no idea of the present value of the property. He testified that the 29-30 foot access "driveway" belongs to the eight-acre tract, not to the one-acre tract, which is true, but is a fact that was known to the Trustee and to Attorney Vawter, as is clearly stated in

Whited's appraisal report. Whitted accepted that the tract had limited access to a public way, and thus Mr. Fox's information in this context was nothing that would have added to the Trustee's understanding of the circumstances of configuration of the two parcels. The court infers from the record, in fact, that had Mr. Fox been consulted, he would have stated that the "driveway" was used primarily for accommodation of the house on the one-acre tract, and thus that there were significant issues that the owner of the one-acre tract could raise concerning exclusive use of this narrow strip of land solely for the benefit of the eight-acre parcel, a cloud on the title that if anything diminishes the eight acres' value, and clearly does not enhance it. Mr. Fox testified that he knew nothing of the construction of the pole barn until he noticed that it had been built. Mr. Fox has no knowledge of the present development potential of the eight-acre tract, or of anything that would have to be done to place the parcel in a position for development as other than vacant farmland. A suggestion was made by Attorney Naggatz that a possible resolution of the case would be to auction the eight-acre parcel subject to the Porter County lawsuit. Mr. Fox testified that potential purchasers who inquired of him about the property, were "scared . . . off" when he mentioned the fact that the property was subject to a pending lawsuit. So much for that concept.

The court determines that a Chapter 7 Trustee in the circumstances of this case has no duty whatsoever to consult with a debtor concerning matters involving property of the estate. In a particular case, there may be circumstances where a debtor's particular expertise and particular knowledge implicates the Trustee's consulting with the debtor as to facts surrounding a proposed compromise. This isn't one of those cases. Consulting with Mr. Fox would have gained the Trustee nothing in elucidating the issues which were required to be resolved.

Based upon the foregoing, the court determines that the Trustee's investigation of the material facts in relation to the proposed compromise was in conformity with applicable law.

The second front upon which Fox attacks the Trustee's compromise is the "best case/

worst case analysis" in relation to the best interests of the estate as to the subject of the compromise.

The facts are that a lawsuit was initiated by Beiswanger which requested two alternative forms of relief: either that Beiswanger be determined to have an interest of some kind in the eight-acre tract under a theory of equitable lien, or that Beiswanger be compensated for the value of the pole barn placed upon the eight-acre tract. The Chapter 7 Trustee was fully represented by special counsel Richard E. Vawter in the state court proceedings. Attorney Vawter, in conjunction with the Trustee (an experienced attorney in her own right), determined that there was little litigation risk with respect to Beiswanger's obtaining a direct interest in the eight-acre tract, but that there was litigation risk with respect to requiring the bankruptcy estate, as owner of the eight-acre tract, to compensate Beiswanger for the value of the pole barn placed upon the eight-acre tract. The pole barn clearly has value, as a separate item of property, or as an improvement placed upon another's real property.

One of the problems with determining whether or not to approve a compromise, under law of the Seventh Circuit, is that in order to determine the reasonableness of a determination to compromise by a trustee, the court is essentially invited to try the underlying case sought to be compromised. The court is not in a position to make a final legal determination as to the outcome of the Porter Superior Court case, and will not do so. However the court is required to review, and to assess, possible outcomes in the litigation. In this context, the court determines the following.

There was no reasonable prospect at all in the state court litigation that: (1) Beiswanger would be awarded the entire eight-acre tract without having to pay compensation for it (despite her innocent understanding of what she purchased); or (2) Beiswanger would be deemed a volunteer as to construction of the pole barn, and she would be neither provided with compensation for it, nor allowed to remove it.

The court determines that possible outcomes are the following:

A. The bankruptcy estate would be required to compensate Beiswanger for the value of the pole barn, but Beiswanger would be determined to have no interest of any nature in the eight-acre tract.

B. Beiswanger would be allowed to remove the pole barn from the eight-acre tract at her expense.

C. Because the pole barn is located on a very small part [5] of the eight-acre tract adjoining the one-acre tract owned by Beiswanger, the portion of the eight-acre tract upon which the pole barn is located would be "cut out" from the eight acres and Beiswanger would be required to compensate the bankruptcy estate for the value of the "cut out" portion of the property.

Attorney Vawter's testimony establishes his opinion that the trial judge in the state court case would not allow the bankruptcy estate to retain the pole barn on the eight acres and not compensate Beiswanger in some way for it. Fox, through Attorney Naggatz, seeks to challenge the Trustee's testimony that she was unsure of what a state court judge would do, by characterizing that testimony as being that she assumed a state court judge would entirely ignore applicable law and do what either he/she "felt was right". This is not what the Trustee stated in her testimony. The testimony is essentially that the actual outcome was a matter of the state trial judge's equitable authority, and that an equitable determination by a trial judge involves unknown factors as to the judge's views of what is "equitable".

Based upon the foregoing, the "best case" scenario for the bankruptcy estate – without consideration of its probability – would be that the pole barn remains on the eight-acre tract, Beiswanger is divested of any interest in it, and the bankruptcy estate does not have to

[5] An area of ½ acre was mentioned at the trial to describe the portion of the eight-acre tract occupied by the pole barn.

compensate Beiswanger in any way for the value of the pole barn. The court, as stated, does not view this determination to be in any manner a reasonable calculation of probability of success in the state court litigation.

The reasonably calculated scenario is one of the three possible determinations outlined above. Any of these determinations begin with the fact determined by the court that the reasonable fair market value of the property is $16,000.00.

The absolute best case scenario for the estate is that Beiswanger would be determined to be entitled to a "cut out" for the pole barn, and then be required to compensate the bankruptcy estate for the value of the underlying real estate subject to the cut out. This value would be *de minimus*, certainly not exceeding one acre of value, i.e., $2,000.00. Under this scenario, Beiswanger would probably be held liable for the divisible portion of delinquent real estate taxes attributable to the "cut out" portion, again a small amount of money. The bankruptcy estate would be liable for the balance of delinquent real estate taxes on the remainder of the parcel. Thus, under this scenario, the bankruptcy estate would be left with an eight-acre tract worth $14,000.00 or slightly more, plus payment by Beiswanger for the "cut out" portion ($2,000.00 or less) – a net of still at most $16,000 to the estate – and the Trustee would then have to market the eight-acre tract through a realtor/broker, with the estate assuming the bulk of delinquent real estate taxes, realtor's fees and closing costs.

The next possible scenario is that Beiswanger would be required to remove the pole barn from the eight-acre tract. This would do nothing to the $16,000.00 fair market value of the property, and the Trustee would still have to market the property, be subject to all delinquent real estate taxes and sales costs with respect to the property, and the uncertainty of a sales price based upon current economic circumstances including the delay of effecting a sale at an acceptable price.

The third scenario is that the pole barn remains on the eight-acre tract, but that the

estate is required to compensate Beiswanger for its value. Putting aside the complexity of the litigation involved in valuing this scenario, the net result would be that the estate has an eight-acre tract worth $16,000.00, with respect to which it must pay Beiswanger some value, and then the resulting marketing of the property with its attendant expenses, including all delinquent real estate taxes. In his testimony, Attorney Vawter stated his worst case scenario to be retention by the estate of the eight-acre tract, but that the estate would be required to reimburse Beiswanger for the costs of construction of the pole barn – between $11,000.00-$12,000.00. The court determines that this assessment is reasonable, given the range of possible "equitable" outcomes available to the trial judge. Under this scenario, the gross value of the property to the estate begins at $4000- $5000 ($16,000 less the payment to Beiswanger for the "value of the pole barn"). While perhaps the state court would engage in a complex valuation of the enhancement to value of the eight-acre tract by the addition of the pole barn, and award Beiswanger this value (which this court would deem to be much less than the construction cost: this court does not deem the value of the tract to be nearly doubled by the addition of a pole barn), this court cannot state with any certainty that the state trial court's determination to award the construction cost to Beiswanger is not possible, and wouldn't be within that's court's equitable discretion. Even if this court were to assume that something less than the construction cost would be awarded, this court does not deem the amount of the award to Beiswanger to be recoverable dollar-for-dollar by the price to be received by the estate upon sale of the property with the pole barn thrown into the deal

The Trustee's proposed compromise provides for the bankruptcy estate's receipt of $14,400.00 for transfer of title to the eight acres to Beiswanger; that Beiswanger pays for the appraisal of the property and for a staked survey of the parcels; that Beiswanger is solely responsible for delinquent taxes on the eight-acre parcel; and that Beiswanger pays any sort of closing costs with respect to the transaction transferring title to the eight acres to Beiswanger.

There is little evidence in this record as to the delinquent amount of real estate taxes with respect to the eight-acre tract; it's at least $1133.80. There is no evidence in the record as to a realtor's commission which would be charged for sale of the real estate, or the tax proration credit which would be required with respect to any such sale or the closing expenses which would be incurred by the bankruptcy estate with respect to any such sale. However, the evidence establishes that the gross market value of the property to the estate is at most $16,000.00. The court finds that the combination of a realtor's commission, tax proration credits, delinquent real estate taxes, and closing expenses would exceed $1,600.00. Thus, the $14,400.00 received in the compromise is in the best interests of the bankruptcy estate. The settlement falls within a reasonable range of litigation outcomes. The Trustee's determination to accept the "deal" with Beiswanger is clearly above the "reasonable worst case scenario" with respect to the matter at hand.

Based upon the foregoing, the court determines that the Trustee's motion should be approved with respect to the issues raised by Fox's objection, and that Fox's objection should be denied.[6]

Based upon the foregoing, the court determines that the Trustee's Motion to Approve Compromise in Settlement is approved, and that Fox's objection to that Motion is

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[6] The Trustee's motion also includes, in paragraph 6, an award of attorney's fees to Attorney Vawter. The court deems the compensation to be allowed to Attorney Vawter as special counsel for the Trustee to be a matter exclusive of this contested matter, and the court's order approving the Trustee's motion will reserve further determination of the amount of compensation to be awarded to Attorney Vawter. Admittedly, the court approved the Trustee's application which proposed a contingency fee, and the Trustee's proposed fee in paragraph 6 of the Application is in line with that application and order. However, this is not a customary "contingency fee" recovery case: the estate was more a defender in the underlying state court action, and it was always relatively clear that the estate owned the eight acres without any reasonable prospect that Beiswanger would obtain title to the eight acres without compensation to the estate in the state court litigation. The court is not deciding the issue of compensation in this decision.

deemed to be a separate matter not involved in the underlying compromise, to be separately determined by the court by separate application for compensation.

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The objection of Curtis Roy Fox to the Trustee's Motion to Approve Compromise in Settlement is denied.

2. The Trustee's Motion to Approve Compromise in Settlement is approved as follows:

a. The Trustee is authorized to convey title of the eight-acre tract to Elise Beiswanger for the sum of $14,400.00.

b. Costs for any survey of the subject real estate obtained during the course of litigation in the Porter Superior Court and in this court shall be borne by Elsie Beiswanger.

c. The cost of the appraisal obtained from Whited Appraisal, Inc. shall be borne by Elsie Beiswanger.

3. All delinquent real estate taxes, and current real estate taxes, with respect to the eight-acre parcel shall be the responsibility of Elsie Beiswanger, who shall hold the estate harmless from any such expense.

4. Compensation to be awarded to Attorney Richard Vawter as special counsel for the Chapter 7 Trustee shall be determined separately, and any request for such compensation stated in paragraph 6 of the Trustee's Motion to Approve Compromise in Settlement is not approved with respect to the court's approval of the other provisions of the Trustee's Motion.

Dated at Hammond, Indiana on March 15, 2011.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee
Attorney for Trustee